

SUPREME COURT FILED

MAR 3 0 2016

IN THE SUPREME COURT OF CALIFORNIA

Frank A. McGuire Clerk

	Deputy
PEOPLE OF THE STATE) No. S231171
OF CALIFORNIA,)
) (Fourth Dist., Div. 1,
Plaintiff and Respondent,) No. D067554)
)
v.) (Imperial County
) Superior Court No. JCF32479)
GIOVANNI GONZALES,)
)
Defendant and Appellant.	
	_)

Appeal from the Superior Court of Imperial County Hon. L. Brooks Anderholt, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

Richard A. Levy (SBN 126824) 3868 W. Carson St., Suite 205 Torrance, CA 90503-6706 (310) 944-3311 Levy@RichardALevy.com

Attorney for Giovanni Gonzales

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE) No. S231171
OF CALIFORNIA,)
Plaintiff and Respondent,) (Fourth Dist., Div. 1,) No. D067554))
v.) (Imperial County
) Superior Court No. JCF32479)
GIOVANNI GONZALES,)
)
Defendant and Appellant.)
)

Appeal from the Superior Court of Imperial County Hon. L. Brooks Anderholt, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

Richard A. Levy (SBN 126824) 3868 W. Carson St., Suite 205 Torrance, CA 90503-6706 (310) 944-3311 Levy@RichardALevy.com

Attorney for Giovanni Gonzales

TABLE OF CONTENTS

Tal	ble of Authorities iv
Iss	ues presented1
ST	ATEMENT OF THE CASE2
I.	Procedural history2
II.	Statement of facts4
AR	GUMENT5
I.	The trial court erred in denying Gonzales's petition for resentencing under Proposition 47, because new Penal Code section 459.5 encompasses cashing forged checks at a commercial establishment where the value is \$950 or less5
	A. Gonzales's crime, burglary involving the theft of \$950 or less, fell within the scope of the mandatory new misdemeanor
	1. Scope of Proposition 475
	2. Burglary amendments7
	3. "Larceny" in section 459 and 459.5 means "theft," including false pretenses
	4. Cashing a forged check at a bank is therefore "larceny" within the meaning of sections 459 and 459.5, and hence subject to Proposition 47
	B. Gonzales's burglary conviction accordingly satisfied the requirements for resentencing under section 459.5
	C. The Court of Appeal therefore erred in affirming the denial of Gonzales's petition on the ground that his crime was not encompassed by section 459.5

	Court's Williams opinion, that defines larceny for purposes of burglary
	2. The colloquial or commonly used definition of "shoplifting" does not displace the statutory definition, and in any event supports that definition
	3. The property taken in the "shoplifting" need not be tangible merchandise
	4. The explicit requirement of Proposition 47 that its terms be liberally construed supports Gonzales's interpretation
	5. The rule of leniency supports Gonzales's interpretation
	D. The remedy is to order the granting of the petition or, in the alternative, to remand for further proceedings 42
II.	In the alternative, the trial court erred in denying Gonzales's petition because Proposition 47 impliedly includes any second-degree burglary involving property valued at \$950 or less
СО	NCLUSION 53
AT'	TACHMENTS (see Cal. Rules of Court, rules 8.204(d), 8.520(b)(1)):
Per Per	n. Code, § 459 n. Code, § 459.5 n. Code, § 484 n. Code, § 490a

TABLE OF AUTHORITIES

Cases
Alejandro N. v. Superior Court (2015) 238 Cal.App.4th 1209 6, 15,
37, 49
Arei II Cases (2013) 216 Cal.App.4th 1004
Ennabe v. Manosa (2014) 58 Cal.4th 697
Estate of Banerjee (1978) 21 Cal.3d 527 50
Ex parte Nicholas (1891) 91 Cal. 640
Ezzy v. Workers' Comp. Appeals Board (1983) 146 Cal. App. 3d 252
40
<u>Fetterly v. Paskett</u> (9th Cir. 1993) 997 F.2d 1295
Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654 15
Gomez v. Superior Court (2005) 35 Cal.4th 1125 32
Grady v. State (2013) 319 Ga.App. 894 [743 S.E.2d 22] 34
Harris v. Superior Court (2016) 242 Cal.App.4th 244, review
granted February 24, 2016, S23148927
<u>Hicks v. Oklahoma</u> (1980) 447 U.S. 343
Holmgren v. County of Los Angeles (2008) 159 Cal.App.4th 593 31
<u>In re Aguilar</u> (2008) 168 Cal.App.4th 1479 44
<u>In re Austin P.</u> (2004) 118 Cal.App.4th 1124
<u>In re Estate of Stoker</u> (2011) 193 Cal.App.4th 236
<u>In re Estrada</u> (1965) 63 Cal.2d 740 10
<u>In re J.L.</u> (2015) 242 Cal.App.4th 1108
<u>In re Joseph B.</u> (1983) 34 Cal.3d 952
<u>Ishola v. State</u> (2008) 404 Md. 155 [945 A.2d 1273]
McLaughlin v. State Board of Education (1999) 75 Cal.App.4th
196
<u>People v. Arias</u> (2008) 45 Cal.4th 169
People v. Ashley (1954) 42 Cal.2d 24610, 11, 14
People v. Bias (2016) Cal.App.4th [199 Cal.Rptr.3d 484] 21,
22, 23, 24, 26
People v. Blakely (2014) 225 Cal.App.4th 1042
<u>People v. Boyce</u> (2014) 59 Cal.4th 672
People v. Brown (2016) 244 Cal.App.4th 1170 [198 Cal.Rptr.3d
789]26
People v. Bruce G. (2002) 97 Cal.App.4th 1233
People v. Bush (March 22, 2016, E062790) Cal.App.4th
[2016 WL 1103986]41
<u>People v. Butler</u> (1996) 43 Cal.App.4th 1224
People v. Calban (1999) 65 Cal.App.3d 578

People v. Cardenas (2015) 239 Cal.App.4th 220	50
People v. Casica (2014) 223 Cal.App.4th 320	26
People v. Chapman (1957) 156 Cal.App.2d 151	23
People v. Chen (2016) Cal.App.4th [199 Cal.Rptr.3d 375]	21
People v. Contreras (2015) 237 Cal.App.4th 868	6
People v. Cuen (2015) 241 Cal.App.4th 454, review granted	
January 20, 2016, S231107	24
People v. Davis (1998) 19 Cal.4th 301	34
<u>People v. Delbos</u> (1905) 146 Cal. 734	10
People v. Diaz (2015) 238 Cal.App.4th 1323	6
<u>People v. Dillon</u> (1983) 34 Cal.3d 441	
<u>People v. Dingle</u> (1985) 174 Cal.App.3d 21	12
<u>People v. Edwards</u> (1925) 72 Cal.App. 102	9
<u>People v. Estes</u> (1983) 147 Cal.App.3d 23	39
People v. Failla (1966) 64 Cal.2d 560	
<u>People v. Gallagher</u> (1893) 100 Cal. 466	
<u>People v. Garcia</u> (2016) Cal.App.4th [199 Cal.Rptr.3d 396]	27
People v. Gonzales (2015) 242 Cal.App.4th 35, review granted	
February 17, 2016, S231171 3, 28, 29, 30, 38, 39, 48,	
<u>People v. Guerrero</u> (1988) 44 Cal.3d 343	
<u>People v. Hiden</u> (1951) 102 Cal.App.2d 655	
People v. Hoffman (2015) 241 Cal.App.4th 1304 5, 6, 43,	
<u>People v. Jackson</u> (1985) 37 Cal.3d 826	
People v. Lamas (2007) 42 Cal.4th 516	
<u>People v. Mendez</u> (1991) 234 Cal.App.3d 1773	
<u>People v. Myers</u> (1929) 206 Cal. 480 10, 13,	
<u>People v. Nguyen</u> (1995) 40 Cal.App.4th 28	
<u>People v. Nor Woods</u> (1951) 37 Cal.2d 584	
People v. One 1986 Cadillac Deville (1999) 70 Cal.App.4th 157.	50
People v. Page (2015) 241 Cal.App.4th 714, review granted	
January 27, 2016, S230793	52
People v. Parson (2008) 44 Cal.4th 332 12, 13,	
<u>People v. Pieters</u> (1991) 52 Cal.3d 894	
<u>People v. Rivera</u> (2015) 233 Cal.App.4th 1085	6
People v. Romanowski (2015) 242 Cal.App.4th 151, review	
granted January 20, 2016, S231405	24
People v. Root (2016) Cal.App.4th [199 Cal.Rptr.3d 516]	20,
25, 26, 29	
People v. Saint-Amans (2005) 131 Cal.App.4th 1076	
People v. Sing (1919) 42 Cal.App. 385	
People v Smith (1978) 78 Cal App. 3d 698	13

People v. Superior Court (Cervantes) (2014) 225 Cal. App. 4th 10	07
People v. Superior Court (Romero) (1996) 13 Cal.4th 497	50
People v. Triplett (2016) 244 Cal.App.4th 824 8, 19, 25, 26,	29
People v. Turner (1986) 42 Cal.3d 711	24
People v. Valencia (March 16, 2016, C079394) Cal.App.4th	_
[2016 WL 1068373]	20
<u>People v. Valentine</u> (1946) 28 Cal.2d 121	36
People v. Vargas (2016) 243 Cal.App.4th 1416.8, 18, 19, 25, 29,	44
People v. Weidert (1985) 39 Cal.3d 836	
People v. Williams (2013) 57 Cal.4th 776 10, 12, 14, 15, 28, 29, 3	30,
39	
<u>T.W. v. Superior Court</u> (2015) 236 Cal.App.4th 646	26
Turner v. Association of American Medical Colleges (2011) 193	
Cal.App.4th 1047	47
Statutes California	
Civ. Code, § 2168	39
Code Civ. Proc., § 1859.	
Corp. Code, § 25504.1	
Health & Saf. Code, § 1345	
Pen. Code, § 7	
Pen. Code, § 32	
Pen. Code, § 211	
Pen. Code, § 320.6	
Pen. Code, § 326.5	
Pen. Code, § 422	
Pen. Code, § 459pass	
Pen. Code, § 459.5pass	
Pen. Code, § 460	
Pen. Code, § 470	
Pen. Code, § 473	
Pen. Code, § 476	40
Pen. Code, § 476a	. 6
Pen. Code, § 484	
Pen. Code, § 487	
Pen. Code, § 490.2	52
Pen. Code, § 490.5	
Pen. Code, § 490apass:	
Pen. Code, § 496	
Pen. Code, § 530.5	

Pen. Code, § 6666	3
Pen. Code, § 667	3
Pen. Code, § 667.5)
Pen. Code, § 1170	7
Pen. Code, § 1170.12 51	L
Pen. Code, § 1170.18	2
Pen. Code, § 1192.7 51	L
Pen. Code, § 1237	2
Veh. Code, § 10851	2
Statutes other states	
Del.Code, tit. 11, § 840	1
Ga.Code § 16-8-14	
Md. Code, Cts. & Jud. Proc., § 3-1301	3
V.Va. Code, § 61-3A-1	
Constitutional Provisions	
J.S. Const., 14th Amend 42	2
Other Authorities	
Ballot Pamp., Gen. Elect. (Nov. 4, 2014)passim	ı
CALCRIM No. 1700	3
LaFave, Substantive Criminal Law (2d ed., 2015 update)11	L
Singer et al., Sutherland on Statutory Construction (7th ed., 2015	5
update) 37, 45, 48	3
Witkin and Epstein, California Criminal Law (4th ed. 2012) 48	3

ISSUES PRESENTED

This Court has specified the issues as follows:

Was defendant entitled to resentencing under Penal Code section 1170.18 on his conviction for second degree burglary either on the ground that it met the definition of misdemeanor shoplifting (Pen. Code, § 459.5) or on the ground that section 1170.18 impliedly includes any second degree burglary involving property valued at \$950 or less?

(Supreme Court of California, News Release, "Summary of Cases Accepted and Related Actions During Week of February 15, 2016, p. 1; see <u>id.</u> ("The statement of the issue or issues in each case set out below does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court").)1

(Petition for review, filed December 15, 2015, p. 2.)

¹ The petition for review stated the issue as follows:

As the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses have been consolidated since 1927 in Penal Code section 490a into the single crime of "theft" defined by section 484 is the term "larceny" as used in section 459.5 confined to the common law meaning or does the mandate of section 490a control?

STATEMENT OF THE CASE

I.

Procedural history

Appellant Giovanni Gonzales (spelled *Gonzalez* in the CT and RT) was charged by felony complaint with two counts arising out of a single incident in December 2013:

COUNT 1: Second-degree burglary (Pen. Code, § 459; Pen. Code, § 460) and COUNT 2: Uttering a forged check (or similar instrument) or possessing it with intent to utter it (Pen. Code, § 476).

(CT 1-2.) He pleaded guilty to count 1 (burglary), and the court dismissed count 2 (uttering a forged check) and granted probation for three years on condition of serving 50 days in jail. (CT 12, 14-16, 24-26; RT (1) 1-3 (change of plea on February 19, 2014), RT (2) 51-53 (sentencing on April 22, 2014).)

On January 16, 2015, about two months after passage of Proposition 47 (2014) (the Safe Neighborhoods and Schools Act), Gonzales petitioned for recall of the sentence and reduction of the burglary felony to a misdemeanor, as authorized by that Act. (CT 52-55; RT (5) 205.) The court denied the petition on the ground that the Act did not encompass reduction of a burglary felony. (CT 77-78; RT (6) 307-308.)

Gonzales filed a timely notice of appeal. (CT 79.) (See Pen. Code, § 1237, subd. (b) (defendant may appeal from "any order made after judgment, affecting the substantial rights of the

party").) The Court of Appeal affirmed the order and denied Gonzales's petition for rehearing without modifying the opinion, and this Court thereupon granted Gonzales's petition for review. (People v. Gonzales (2015) 242 Cal.App.4th 35, petition for rehearing denied November 30, 2015, review granted February 17, 2016, S231171.)

II.

Statement of facts

According to the probation report, in late 2013 Gonzales, age 21, stole his grandmother's checkbook after visiting her at her home. (CT 28, 30-31.) He made two checks out to himself for \$125 each (\$250 total) and signed his grandmother's name without her permission. (CT 30-31.) He cashed the checks on two separate days at a Bank of America branch in El Centro during normal business hours (9:09 a.m. on December 2, 2013, and 12:28 p.m. on December 7, 2013). (CT 31.)

ARGUMENT

I.

The trial court erred in denying Gonzales's petition for resentencing under Proposition 47, because new Penal Code section 459.5 encompasses cashing forged checks at a commercial establishment where the value is \$950 or less

A. Gonzales's crime, burglary involving the theft of \$950 or less, fell within the scope of the mandatory new misdemeanor.

1. Scope of Proposition 47. Proposition 47, the Safe Neighborhoods and Schools Act, "reclassifies certain drug- and theft-related offenses from felonies or wobblers to misdemeanors." (People v. Hoffman (2015) 241 Cal.App.4th 1304. 1309.) The voters enacted it "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs." (Ballot Pamp., Gen. Elect. (Nov. 4, 2014) text of Prop. 47, § 2 ("Findings and Declarations"), p. 70 (hereafter Pamphlet).) The act allows defendant to petition or apply to the superior court for resentencing if he "would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense." (Pen. Code, § 1170.18, subd. (a) (petition by defendant who is currently serving his sentence); id., subd. (f) (application by defendant who has already served his sentence); Hoffman at pp. 1309-1310; People v. Diaz (2015) 238

Cal.App.4th 1323, 1331-1332.)

If defendant satisfies the statutory criteria, resentencing is mandatory. (Hoffman at p. 1311 ("The trial court may not refuse to reduce a defendant's sentence based on the court's notion of the statute's 'spirit'"); Alejandro N. v. Superior Court (2015) 238 Cal.App.4th 1209, 1222-1223 ("the court is required to resentence the petitioner unless he or she" does not meet certain requirements); see Pen. Code, § 1170.18, subd. (b), (i) (defendant is ineligible if he has a prior conviction for specified crimes or (for a currently serving defendant) if his release "would pose an unreasonable risk of danger to public safety").)

The Act modified or created several statutes to treat certain theft-related felonies or wobblers as mandatory misdemeanors if the amount at issue was \$950 or less. (Pen. Code, § 459.5 (new crime for certain commercial burglaries that would otherwise be covered by Pen. Code, § 459); Pen. Code, § 473, subd. (b) (new subdivision for forgery); Pen. Code, § 476a (amended version for checks drawn with insufficient funds); Pen. Code, § 490.2 (new crime for certain thefts); Pen. Code, § 496 (amended version for receiving stolen property); Pen. Code, § 666 (amended version for petty theft with a prior); People v. Contreras (2015) 237 Cal.App.4th 868, 889-890.) (The Act also reduced the punishment for drug-possession crimes. (See Pen. Code, § 1170.18, subd. (a); People v. Rivera (2015) 233 Cal.App.4th 1085, 1091-1092.))

2. <u>Burglary amendments</u>. Proposition 47 created and defined a new crime for theft of \$950 or less from a commercial establishment during business hours:

Notwithstanding [Pen. Code] Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person [with specified prior convictions] may be punished pursuant to subdivision (h) of [Penal Code] Section 1170.

(Pen. Code, § 459.5, subd. (a).)

The text thus explicitly carves out certain crimes that would otherwise be punishable as burglary. Burglary is entry "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) If the entry is to a commercial establishment during business hours with intent to commit "larceny" involving \$950 or less, the crime falls solely under section 459.5, not section 459. (Pen. Code, § 459.5, subd. (a) ("Notwithstanding Section 459 . . .").) In all other cases, such as where the value of the property is more than \$950, or where the entry takes place when the establishment is closed, the crime remains burglary. (<u>Id.</u>, subd. (a) ("Any other entry into a commercial establishment with intent

to commit larceny is burglary").)

If the crime qualifies under the new section, it *must* be charged under that section, and only that section:

Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

(Pen. Code, § 459.5, subd. (b); <u>People v. Vargas</u> (2016) 243 Cal.App.4th 1416, 1423.)

3. "Larceny" in section 459 and 459.5 means "theft," including false pretenses.

Larceny encompasses false pretenses. "Larceny" has a technical definition: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefore." (Pen. Code, § 490a.) Thus, "larceny" in both section 459 and new section 459.5 means "theft." (People v. Triplett (2016) 244 Cal.App.4th 824, 833-834; People v. Vargas, supra, 243 Cal.App.4th at p. 1427.)

"Theft," in turn, is defined by statute to encompass not only common-law larceny but also false pretenses, among other crimes:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

(Pen. Code, § 484, subd. (a).)

The expansive definition of larceny was a deliberate legislative policy decision. The Legislature's primary reason for replacing larceny with the more-expansive crime of theft is well documented. The intent was to try to prevent guilty defendants from slipping away from the net of any single theft-related crime. The method was to join the nets of larceny, embezzlement, and false pretenses together, into "theft."

Prior to the 1927 amendments, the crimes of nonforcible theft – larceny (including larceny by trick), embezzlement, and false pretenses – were distinct and did not overlap. For example, it was larceny by trick if defendant fraudulently obtained physical possession but not title, whereas it was false pretenses if he fraudulently obtained both possession and title. (People v. Edwards (1925) 72 Cal.App. 102, 113 ("It is essential in such cases that the owner shall intend to part with the possession only, and not to pass the title as well. If he intends to pass both the possession and the title, the transaction, though it may amount

to the crime of obtaining property by false pretenses, will not constitute larceny"), disapproved on other grounds in In re Estrada (1965) 63 Cal.2d 740, 748; see also People v. Ashley (1954) 42 Cal.2d 246, 258.) If defendant lawfully obtained possession with the owner's consent and without fraud, but then misappropriated the property, the crime could only be embezzlement, not larceny. (People v. Gallagher (1893) 100 Cal. 466, 467-468.) (Larceny by trick was not a separate crime from larceny; larceny required obtaining possession without the owner's consent, and if the consent was vitiated by fraud, it was deemed to be vitiated or invalidated. (See People v. Sing (1919) 42 Cal.App. 385, 390-392; People v. Williams (2013) 57 Cal.4th 776, 783-784.))

Courts and juries sometimes had difficulty determining the boundaries, with the result that "defendants [could] escape just conviction solely because of the border line distinction existing between these various crimes." (People v. Myers (1929) 206 Cal. 480, 483-484; see also People v. Delbos (1905) 146 Cal. 734, 736 ("The distinction between larceny and false pretenses sometimes depends on a close analysis of facts and legal principles"); Exparte Nicholas (1891) 91 Cal. 640, 643 ("It not unfrequently happens that the facts of a particular case leave it extremely doubtful under which definition the offense falls, that of larceny or embezzlement").) As LaFave explains:

We have seen that English legal history explains the fact that in American jurisdictions the wrongful appropriation of another's property was covered by three related but separate, non-overlapping crimes – larceny, embezzlement and false pretenses. This fact, together with the fact [cross-reference] that the borderlines between the three crimes are thin and often difficult to draw, gave rise to a favorite indoor sport played for high stakes in our appellate courts: A defendant, convicted of one of the three crimes, claimed on appeal that, though he is guilty of a crime, his crime is one of the other two.

(3 LaFave, Substantive Criminal Law (2d ed., 2015 update) § 19.8.)

With the 1927 amendments, although the substantive elements of each theory of theft remain unchanged, the People were now allowed to plead theft without electing the type of theft, and the jury was allowed to find defendant guilty of theft without unanimously agreeing on whether the crime was larceny or any of the other theories of theft. (People v. Ashley, supra, 42 Cal.2d 246, 258; People v. Nor Woods (1951) 37 Cal.2d 584, 586 ("defendant could be found guilty of theft by one means or another, and since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell"); People v. Hiden (1951) 102 Cal.App.2d 655, 659 ("No longer need the legal profession puzzle over fine distinctions between embezzlement, larceny, and other elements of stealing").)

The cases have applied this expansive principle to burglary.

Section 490a applied to burglary as well, insofar as the intended crime was theft. Now, under the statutory definition, an intent to commit "larceny" in section 459 encompasses an intent to commit theft by false pretenses. (See Pen. Code, § 490a ("Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor").)

This Court has indeed squarely so held: "An intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction." (People v. Parson (2008) 44 Cal.4th 332, 354; see also People v. Williams, supra, 57 Cal.4th at p. 789, fn. 4 ("if a defendant enters a store with the intent to commit theft by false pretenses (as defendant did here), and if that defendant, while fleeing, kills a store employee, that defendant can be convicted of felony murder burglary") (emphasis added); People v. Dingle (1985) 174 Cal.App.3d 21, 30 ("Section 490a not only changed section 484 so that the word 'larceny' formerly used therein became superseded by the word 'theft,' but plainly means that the word 'larceny' in section 459 shall now be read and interpreted as if the word 'theft' were substituted").)

A defendant now could not escape the net by claiming that his crime was, say, entry with intent to commit theft by false

pretenses, rather than larceny by trick.2

This principle of the joined and now-wide net is illustrated by People v. Nguyen (1995) 40 Cal.App.4th 28. There, defendant, responding to private parties' newspaper ads, entered the victims' houses for the ostensible purpose of buying the advertised items, but in fact intending to steal the items by tendering a worthless check. (Id. at p. 30.) He was convicted of burglary. (Ibid.) On appeal he argued that "an intent to commit a misdemeanor or 'petit' theft by false pretenses is insufficient to support a burglary conviction." (Ibid.) The Court of Appeal disagreed and affirmed the convictions, reasoning that by enacting section 490a (under which "larceny" was to be treated as "theft"), "the Legislature has indicated a clear intent that the term "larceny" as used in the burglary statute should be read to include all thefts, including 'petit' theft by false pretenses." (Id. at p. 31; see People v. Parson, supra, 44 Cal.4th at p. 354 (citing Nguyen with approval).)

Similarly, in <u>People v. Myers</u>, <u>supra</u>, 206 Cal. at p. 481, the information charged that defendant "burglariously enter[ed] the store . . . with the intent then and there and therein to commit the crime of theft." This Court, rejecting defendant's challenges to the sufficiency of the information, held that section 490a

² The jury need not unanimously agree on the crime that a burglary defendant intended, but the indictment or information must specify the intended crime or crimes, and the jury must be instructed on the elements of each potential intended crime. (People v. Failla (1966) 64 Cal.2d 560, 568-569; People v. Smith (1978) 78 Cal.App.3d 698, 706; CALCRIM No. 1700, Bench Notes, Instructional Duty.)

applied to the burglary statute (section 459), so that the intent to commit any type of theft constituted burglary. (Myers at pp. 483-485.)

This principle is also indirectly supported by People v. Williams, supra, 57 Cal.4th 776. There, this Court considered "whether robbery's element of 'felonious taking' can be satisfied through theft by false pretenses." (Id. at p. 786.) The Court concluded that "[b]v adopting in the robbery statute ([Pen. Code.]) § 211) the phrase 'felonious taking' that was used in the common law with regard to both robbery and larceny, the California Legislature in all likelihood intended to attach to the statutory phrase the same meaning the phrase had under the common law," so that theft by false pretenses did not satisfy the element of felonious taking. (Id. at pp. 786-787.) Williams specifically rejected the dissent's theory that section 490a applied to robbery under section 211, for that statute "does not expressly mention larceny or stealing." (Id. at p. 789; see id. at pp. 796-797 (Baxter, J., dissenting).) Section 459 does "expressly mention larceny," and therefore under <u>Williams</u> it is governed by section 490a. In fact, Williams specifically reaffirmed People v. Myers, supra, 206 Cal. 480 and People v. Ashley, supra,42 Cal.2d 246. (People v. Williams, supra, 57 Cal.4th at p. 789 & fn. 5.) As noted above, Myers specifically applied section 490a to burglary, so that the intent to commit any theft, not just larceny, was sufficient. (Myers at pp. 483-485.) Ashley reaffirmed Myers, as Williams noted. (See Ashley at pp. 258-259; Williams at p. 789, fn. 5.)

The statutory definition of larceny applies to new section 459.5 under established principles of statutory construction.

Section 459.5, like section 459, "expressly mention[s] larceny"

(Williams at p. 789) and is therefore governed by the statutory definition of section 490a.

This is also supported by the fact that section 459.5 was enacted subsequent to section 490a and subsequent to the cases cited above. The Legislature and the voters are presumed to be aware of both existing statutory definitions and existing judicial interpretations of the statute. (E.g., Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 675 ("When the Legislature enacts language that has received definitive judicial construction, we presume that the Legislature was aware of the relevant judicial decisions and intended to adopt that construction"); People v. Weidert (1985) 39 Cal.3d 836, 845-846 ("Where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts. This principle applies to legislation adopted through the initiative process"), internal quotation marks and citations omitted.)

The Court of Appeal, for example, has construed Proposition 47 to apply to juveniles based in part on this principle. (Alejandro N. v. Superior Court, supra, 238 Cal.App.4th at p. 1225 ("An enacting body is deemed to be aware of existing laws at the time legislation is enacted and to have enacted or amended a statute in light thereof; this principle

applies as well to legislation enacted by voter initiative"); cf. People v. Superior Court (Cervantes) (2014) 225 Cal.App.4th 1007, 1015 (in enacting Proposition 36 (2012) (amending the three-strikes law) the voters were "deemed to have been aware of the long-standing statutory and judicially construed definition of 'armed with a firearm," and therefore must have intended the term to have the same meaning in the initiative).)³

That "almost irresistible" presumption (Weidert) applies here. In using the term "larceny" in section 459.5, without any elaboration or separate definition, the voters must have intended the term to mean theft, as directed by section 490a, defined in section 484, and as construed by cases such as People v. Parson, supra, 44 Cal.4th at p. 354. Otherwise, the voters would have defined it differently for purposes of the statute, or explicitly excepted it from the scope of section 490a. (The Penal Code contains numerous examples of such carve outs. (E.g., Pen. Code, § 320.6, subd. (a) ("Notwithstanding Section 320.5, this section shall apply to an eligible organization, as defined in subdivision (c)"); Pen. Code, § 326.5, subd. (a) ("It is the intention of the Legislature that bingo as defined in this subdivision applies exclusively to this section and shall not be applied in the construction or enforcement of any other provision of law").))

Separately, it is presumed that a term has the same

³ "Both Proposition 47 and Proposition 36 are similar in structure and contain similar remedial resentencing provisions," so that cases interpreting Proposition 36 provide guidance in interpreting Proposition 47. (People v. Rouse (2016) __ Cal.App.4th __ [199 Cal.Rptr.3d 360, 365].)

meaning wherever it is used in a single statute. (People v. Dillon (1983) 34 Cal.3d 441, 468.) Here, the first sentence of section 459.5, subdivision (a), defines the *new* crime as entry into a commercial establishment during business hours "with intent to commit larceny" involving a value of \$950 or less. The same subdivision specifies that where these requirements are not satisfied, the crime is burglary: "Any other entry into a commercial establishment with intent to commit larceny is burglary." (Pen. Code, § 459.5, subd. (a).) Burglary is already defined as entry into a "shop" or other structure "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) There is no indication in Proposition 47 itself or in the voters' material that the Act was intended to *change* the definition of burglary contained in section 459. Accordingly, the second use of "larceny" in section 459.5 must mean the same thing as "larceny" in section 459 – that is, theft. Under the Dillon presumption, the first use of "larceny" in section 459.5 means the same as the second use in that section, that is, the same as in section 459.

Further, "[i]t is an established rule of statutory construction that similar statutes should be construed in light of one another and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings." (People v. Lamas (2007) 42 Cal.4th 516, 525, internal quotation marks, emendations, and citations omitted.) Sections 459 and 459.5 are certainly on the same subject, and indeed the latter expressly cross-references the former. Thus, larceny should be interpreted the same way in both.

The very structure of section 459.5 supports interpreting larceny the same in section 459.5 as in section 459. The new crime is a carve-out from burglary. If defendant satisfies the prerequisites, he gets the benefit of a moderated punishment; if not, he remains subject to the general punishment for burglary. (See Pen. Code, § 459.5, subd. (a) ("Any other entry into a commercial establishment with intent to commit larceny is burglary").) If larceny meant two different things, there would be a possibility that a defendant could violate section 459.5 without also violating section 459, which would be inconsistent with the carve-out structure.

For all of these reasons, "larceny" in section 459.5 encompasses theft by false pretenses.

4. Cashing a forged check at a bank is therefore "larceny" within the meaning of sections 459 and 459.5, and hence subject to Proposition 47. Applying the principles discussed above, several published opinions of the Court of Appeal have held that cashing a forged check at a bank or similar institution, which is theft by false pretenses, is "larceny" within the meaning of sections 459 and 459.5, so that a conviction of burglary based on the intent to commit that larceny is within the scope of Proposition 47.

Thus, in <u>People v. Vargas</u>, <u>supra</u>, 243 Cal.App.4th 1416, 1421, defendant entered a check-cashing business during business hours and attempted to cash a check that she had

forged. She pleaded guilty to second-degree burglary and was sentenced to probation. (<u>Ibid.</u>) Later, during probation revocation proceedings, she petitioned for resentencing under section 1170.18, arguing that her crime was really "shoplifting" as defined by section 459.5. (Ibid.) The trial court denied the petition, reasoning that the new crime did not encompass defendant's fraudulent intent because "shoplifting" is generally understood to mean stealing merchandise. (Ibid.) The Court of Appeal disagreed and reversed. (Id. at pp. 1428-1429.) The court observed that "[1] arceny is statutorily equated with 'theft' ([Pen. Code, \ 490a), and 'theft' is defined to include theft by false pretenses." (Id. at p. 1420.) Accordingly, defendant's intent was to commit "larceny" within the meaning of sections 459 and 459.5. (Id. at pp. 1420, 1427.) Whatever the colloquial definition of "shoplifting," the definition that the voters gave it was controlling. (Id. at p. 1420.) Because the intended value was under \$950, defendant's crime was a violation of section 459.5, and she was therefore entitled to resentencing if the other prerequisites of Proposition 47 were satisfied. (Id. at pp. 1428-1429.)

Similarly, in <u>People v. Triplett</u>, <u>supra</u>, 244 Cal.App.4th at pp. 827-828, defendant pleaded guilty to second-degree burglary based on entering a market and cashing a fraudulent check for less than \$950. The Court of Appeal held that in light of the broad definition of "larceny" under sections 490a and 484, defendant's crime was within the scope of section 459.5. (<u>Id.</u> at pp. 832-834.) Defendant was therefore entitled to resentencing if

the other prerequisites of Proposition 47 were satisfied. (<u>Id.</u> at pp. 834-835.)⁴

In <u>People v. Root</u> (2016) __ Cal.App.4th __ [199 Cal.Rptr.3d 516, 517], defendant was convicted of several counts of burglary based on "incidents in which [he] entered banks, during regular business hours, for the purpose of cashing forged checks in amounts less than \$950." The trial court denied his petition to reduce the burglary convictions under Proposition 47 on the ground that the burglaries did not constitute "shoplifting" under section 459.5. (<u>Ibid.</u>) The Court of Appeal reversed, for in light of section 490a, defendant's intent to commit theft by false pretenses constituted an intent to commit larceny within the meaning of section 459.5. (<u>Id.</u> at p. 521.)

In a closely analogous case, "defendant went into an AT&T store and purchased a prepaid phone for \$249.74 with counterfeit \$50 bills." (People v. Valencia (March 16, 2016, C079394) __ Cal.App.4th __ [2016 WL 1068373, *1].) He pleaded guilty to burglary and subsequently moved to reduce the crime under Proposition 47. (Ibid.) The trial court denied the motion, reasoning that the crime was not "shoplifting." (Ibid.) The Court of Appeal disagreed, finding that "[t]he trial court erred by allowing section 459.5's term for the offense, shoplifting, to govern the definition of the crime," instead of using the actual

⁴ The People have filed petitions for review in these two cases. (<u>People v. Vargas</u>, <u>supra</u>, petition for review filed February 26, 2016, S232673; <u>People v. Triplett</u>, <u>supra</u>, petition for review filed March 21, 2016, S233172.)

definition contained in section 459.5. (<u>Id.</u> at p. *2.) Defendant intended to commit theft by false pretenses and forgery, and his conduct therefore could not be prosecuted as burglary. (<u>Ibid.</u>)

This principle is also indirectly supported by another recent case. In People v. Chen (2016) _ Cal.App.4th _ [199 Cal.Rptr.3d 375, 376], defendant entered a DMV office intending to commit perjury in order to obtain a driver license. He pleaded no contest to second-degree burglary. (Ibid.) The Court of Appeal held that he was not eligible for Proposition 47 relief because "[t]here simply was no larceny, that is, no theft of any kind, involved in [defendant's] case." (Id. at p. 378.) Rather, "[h]e was convicted of felony second degree burglary based on the entry into a building with the intent to commit the felony of perjury." (Ibid.) In referring to "no larceny, that is, no theft of any kind" (ibid., emphasis added), the court impliedly recognized that the expansive definition of sections 490a and 484 applied to new section 459.5, so that any theft – "theft of any kind" – constituted "larceny."

183

One recent opinion has viewed the broader issue somewhat differently, without addressing the definition of "larceny." In People v. Bias (2016) __ Cal.App.4th __ [199 Cal.Rptr.3d 484, 485], defendant entered a bank and attempted to cash a fraudulent check for under \$950. Defendant was charged with burglary and forgery, and pleaded guilty to burglary. (Ibid.) The trial court granted his petition to reduce the burglary to the new crime, section 459.5. (Ibid.) On the People's appeal, the court

reversed, reasoning that the intended crime was not forgery but rather identity theft, that is, "willfully obtain[ing] personal identifying information . . . of another person, and us[ing] that information for any unlawful purpose" (Pen. Code, § 530.5, subd. (a)). (Id. at pp. 487-488.) Bias held that "[t]he act of entering a bank with the intent to commit identity theft is not the act identified in section 459.5, subdivision (a), i.e., entry with intent to commit petty theft." (Id. at p. 488.)

Bias erred in failing to apply the statutory requirement that if an act could be charged under section 459.5, it must be so charged. (Pen. Code, § 459.5, subd. (b) ("Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property").) An entry need not involve only a single intent. (See, e.g., People v. Failla, supra, 64 Cal.2d at p. 568 ("The gravamen of a charge of burglary is the act of entry itself, and [a]n entry may be made with intent to commit two or more felonies, but that would constitute only one burglary"), internal quotation marks and citation omitted.) Thus, even if defendant in Bias entered with the intent to commit identity theft, he certainly also entered with the intent to commit theft by false pretenses by presenting the fraudulent check. Accordingly, the crime would have had to be charged under section 459.5, and hence defendant was entitled to reduction to that misdemeanor. Here, too, Gonzales certainly entered the bank intending to commit theft by false pretenses, which he indeed accomplished, obtaining \$250 for the cashed checks. (CT

31.) (See, e.g., People v. Chapman (1957) 156 Cal.App.2d 151, 160 (obtaining cash from bank by false pretenses was theft under section 484).) Thus, his act or conduct (Pen. Code, § 459.5, subd. (b) ("Any act of shoplifting, as defined in subdivision (a), shall be charged as shoplifting"), emphasis added.) Whatever other intent he might have harbored is irrelevant in light of the mandatory charging requirement of section 459.5.

Proposition 47 does provide that identity theft is excluded from its remedial scope even when it involves forgery of a check, but only if there is an actual conviction for identity theft in addition to a conviction for forgery. (Pen. Code, § 473, subd. (b) ("This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5"); Pen. Code, § 470; Pamphlet, supra, § 6, p. 71.) Further, there is no analogous restriction in section 459.5. Thus, even if Gonzales's conduct could be characterized as identity theft, that would not affect his right to relief

For these reasons, $\underline{\text{Bias}}$ was not fully considered and should not be followed.⁵

⁵ This Court is currently considering a related issue:

Does Proposition 47 ("the Safe Neighborhoods and Schools Act"), which reclassifies as a misdemeanor any grand theft involving property valued at \$950 or less (Pen. Code, § 490.2), apply to theft of access card information in violation of Penal Code section 484e, subdivision (d)?

⁽Supreme Court of California, News Release, "Summary of Cases Accepted and Related Actions During Week of January 18, 2016, pp. 1-2, citing People v. Romanowski (2015) 242 Cal.App.4th 151,

Finally, <u>Bias</u> would not apply to this case in any event because the trial court specifically found that the intended crime was forgery, and the People conceded that fact:

THE COURT: ... I believe that the underlying offense in this case, Ms. Trapnell [prosecutor], was a forged check under 476 or 476(A). Am I correct, Ms. Jafine [defense counsel]?

[DEFENSE COUNSEL]: I don't think it was charged.

THE COURT: Regardless of whether it was charged,
that was the underlying activity that lead [sic] to the
charge.

[PROSECUTOR]: That's the conduct, your Honor.

(RT (7) 304, emphasis added.) The People have thus forfeited any argument that the intended crime was actually identity theft.

(See People v. Mendez (1991) 234 Cal.App.3d 1773, 1783 ("The People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney"); People v. Turner (1986) 42 Cal.3d 711, 722, fn. 7 ("our concern is with the explanation the prosecutor gave to the trial court, not with a theory subsequently devised by the Attorney General for consumption on appeal").)

review granted January 20, 2016, S231405 and <u>People v. Cuen</u> (2015) 241 Cal.App.4th 454, review granted January 20, 2016, S231107.)

B. Gonzales's burglary conviction accordingly satisfied the requirements for resentencing under section 459.5.

The intended crime was false pretenses. Gonzales's case is in the same posture as People v. Vargas, supra; People v. Triplett, supra; and People v. Root, supra. He was convicted of seconddegree burglary based on entering a bank during normal business hours with intent to commit theft by false pretenses. namely, cashing forged checks totaling less than \$950. (CT 12, 14-16, 24-26; RT (1) 1-3.) The People conceded that these were the facts of the crime. (CT 57 (two checks for \$125 each had been cashed at a Bank of America); CT 58 ("He forged his grandmother's signature on two checks and cashed the two checks" at the bank); CT 73 ("The circumstances of the instant case are clear: The defendant entered into the Chase [sic] bank with the intent to pass several forged checks").) The probation report, basing its information on "the District Attorney's file," corroborated these facts. (CT 30-31.) And as noted above, the trial court found, and the People conceded, that "the underlying activity that lead [sic] to the charge" was forgery. (RT (7) 304.)

The crime involved a commercial establishment during normal business hours. It was undisputed that Gonzales entered during normal business hours (9:07 a.m. and 12:28 p.m., according to the probation report (CT 31)), and indeed he could not have cashed the checks otherwise.

A bank is a commercial establishment. (People v. Root,

supra, 199 Cal.Rptr.3d at pp. 517-518 ("the People, on appeal concede that the banks were commercial establishments within the meaning of the statute"); People v. Saint-Amans (2005) 131 Cal.App.4th 1076, 1084, 1087 (bank was direct victim of defendant's "commercial burglary" and hence entitled to restitution); see also People v. Casica (2014) 223 Cal.App.4th 320, 321 (noting that defendant had been convicted of commercial burglary based on cashing forged checks at a bank); In re J.L. (2015) 242 Cal.App.4th 1108, 1114 (interpreting "commercial establishment" by relying in part on a federal statute under which a bank was a "commercial establishment").)6

It is irrelevant that the conviction was by plea. It does not matter that that Gonzales was convicted by plea, not after trial. (See Pen. Code, § 1170.18, subd. (a) ("A person currently serving a sentence for a conviction, whether by trial or plea"); People v. Triplett, supra, 244 Cal.App.4th at p. 830, fn. 4 (rejecting as irrelevant the People's argument that they would not have agreed to a plea bargain involving only a misdemeanor); T.W. v. Superior Court (2015) 236 Cal.App.4th 646, 652 ("nothing in section 1170.18 reflects an intent to disqualify a petitioner because the conviction was obtained by plea agreement"); People v. Brown (2016) 244 Cal.App.4th 1170 [198 Cal.Rptr.3d 789, 794] (granting

⁶ One of the recent Proposition 47 cases, however, has considered it an open question whether a bank is a commercial establishment under section 459.5. (<u>People v. Bias</u>, <u>supra</u>, 199 Cal.Rptr.3d at p. 488.)

relief under Proposition 47: "Although the parties and the trial court may not unilaterally alter the terms of a plea bargain, subsequent statutory enactments or amendments adopted by the Legislature or the voters exercising the initiative power may have the effect of altering the terms of the plea bargain").)7

Gonzales was under sentence. Finally, Gonzales was "currently serving a sentence" (Pen. Code, § 1170.18, subd. (a)) for the burglary conviction, in that he was on three years' probation. (See CT 24; RT (2) 52.) (See People v. Garcia (2016) __ Cal.App.4th __ [199 Cal.Rptr.3d 396, 399] (Pen. Code, § 1170.18, subd. (a), applies to a defendant who is on felony probation).) In any event, at the time of the petition Gonzales was in fact serving his sentence on the burglary count. Probation on that count had been revoked following the probation officer's accusation of

⁷ This issue, however, is currently under review in <u>Harris v. Superior Court</u> (2016) 242 Cal.App.4th 244, review granted February 24, 2016, S231489:

⁽¹⁾ Are the People entitled to withdraw from a plea agreement for conviction of a lesser offense and to reinstate any dismissed counts if the defendant files a petition for recall of sentence and reduction of the conviction to a misdemeanor under Proposition 47? (2) If the defendant seeks such relief, are the parties returned to the status quo with no limits on the sentence that can be imposed on the ground that the defendant has repudiated the plea agreement by doing so?

⁽Supreme Court of California, News Release, "Summary of Cases Accepted and Related Actions During Week of February 22, 2016, p. 1.)

simple drug possession, and Gonzales was remanded to custody. (CT 48; CT 51-52; RT (5) 204-205.)

Thus, Gonzales meets all of the requirements of sections 459.5 and 1170.18. He therefore qualified for resentencing to a misdemeanor.

- C. The Court of Appeal therefore erred in affirming the denial of Gonzales's petition on the ground that his crime was not encompassed by section 459.5.
- 1. It is the statutory definition of section 490a, not this Court's Williams opinion, that defines larceny for purposes of burglary. The Opinion below, relying on People v. Williams, supra, 57 Cal.4th 776, reasoned that "larceny" required a nonconsensual taking, whereas the false pretenses in Gonzales's case, like the sale of gift cards in Williams (which the defendant paid for with fraudulently altered payment cards), was consensual. (People v. Gonzales, supra, 242 Cal.App.4th at pp. 39-40; see Williams at pp. 779, 788-789.)

As explained in subsection (A)(3) above, however, this expands <u>Williams</u> beyond the limit that <u>Williams</u> itself explicitly set. <u>Williams</u> was a robbery case that construed the common-law definition of "felonious taking." (<u>Williams</u> at p. 786 ("By adopting in the robbery statute (§ 211) the phrase 'felonious taking' that was used in the common law with regard to both robbery and larceny, the California Legislature in all likelihood intended to attach to the statutory phrase the same meaning the phrase had

under the common law").) Williams specifically recognized that for theft and burglary, it was the statutory, not common law, definition that applied, so that theft by false pretenses, though not larceny, was a sufficient intent for burglary. (See Williams at p. 789, fn. 4 ("Also, if a defendant enters a store with the intent to commit theft by false pretenses (as defendant did here), and if that defendant, while fleeing, kills a store employee, that defendant can be convicted of felony-murder burglary").) Thus, it is not necessary to speculate whether Williams's analysis of robbery also applied to burglary: Williams itself said no.

Post-Gonzales opinions of the Courts of Appeal – including a panel of the same Division – have concurred that Williams did not apply to burglary; rather, the definition of "larceny" in the burglary statute is governed by section 490a and section 484. (People v. Vargas, supra, 243 Cal.App.4th at p. 1420 ("we disagree with Gonzales that the phrase 'intent to commit larceny' excludes the intent to commit theft by false pretenses"); ibid. ("we find Williams distinguishable because it involved the interpretation of the 'felonious taking' element of robbery, not burglary") (italics in original); People v. Triplett, supra, 244 Cal.App.4th at p. 833 ("We decline to follow the reliance in Gonzales on robbery cases when the Penal Code itself provides a definition of larceny which applies to burglaries such as those at issue here"); People v. Root, supra, 199 Cal.Rptr.3d at p. 520 ("The analysis in Williams [citation] is distinguishable from our current issue of whether section 459.5 can be satisfied by theft by false pretenses"); People v. Valencia, supra, 2016 WL 1068373, *2 (Williams did not apply

to burglary because "the Legislature retreated from the common law use of the term by consolidating the formerly separate crimes of larceny, embezzlement, and theft by false pretenses into the general crime of theft").)

Gonzales therefore erred in applying Williams to a type of case (burglary) that Williams itself held was not covered by its construal of the common-law definition. Gonzales also erred in overlooking the statutory definition of "larceny" that did apply: section 490a, which Williams itself recognized applied to burglary. (People v. Williams, supra, 57 Cal.4th at p. 789 & fn. 4.) Gonzales did not refer to that statute at all.8

2. The colloquial or commonly used definition of "shoplifting" does not displace the statutory definition, and in any event supports that definition. The trial court reasoned that "shoplifting," as new section 459.5 was named, did not encompass passing a forged check at a bank:

We don't have larceny. We don't have a carrying away of merchandise. We don't have a nonconsensual theft. We have a consensual theft. The defendant goes in and utters a check against the account of his grandmother or family member. The bank is handing the money over with consent. This is not a nonconsensual transaction. [¶] I do not believe that

⁸ Section 490a was discussed in the opening brief (AOB 11·13) and the reply brief (ARB 3), and the Opinion's failure to address that statute was the basis of the petition for rehearing (PFR 2·7).

459.5, Proposition 47, applies to this particular type of case.

(RT (7) 305.) This analysis was erroneous on two grounds.

First, the colloquial definition is irrelevant. The Penal Code specifies that a technical definition in the statute must be applied where it differs from common usage:

Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

(Pen. Code, § 7, ¶ 16; see also, e.g., Holmgren v. County of Los Angeles (2008) 159 Cal.App.4th 593, 604 ("Where (as here) the term is defined by the statute, the legislature's definition controls and the doctrine of common law employment is irrelevant"); Arei II Cases (2013) 216 Cal.App.4th 1004, 1017 ("Although liability under [Corp. Code] section 25504.1 may be referred to colloquially as aiding and abetting liability, we are not free to apply definitions of aiding and abetting derived from common law or other sources. We are bound to interpret and apply the language of the statute").)

Here, the new statute contains its own definition of shoplifting: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business

hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950)." (Pen. Code, § 459.5, subd. (a).) "Larceny," in turn, is governed by an unequivocal statutory definition that applies "[w]herever any law or statute of this state refers to or mentions larceny." (Pen. Code, § 490a, emphasis added.) Thus, whether or not section 459.5 incorporates by reference the definition of "larceny" in section 459, the identical definition applies by direct operation of section 490a.

There is nothing unusual in the fact that a statutory definition does not align with common usage, and indeed there would be no need for a statutory definition if it merely reflected such usage. For example, not even the most careless colloquial speaker would consider that a "person" included "any person, individual, firm, association, organization, partnership, business trust, foundation, labor organization, corporation, limited liability company, public agency, or political subdivision of the state," which is in fact the technical definition of "person" for purposes of the statutes governing health care plans. (Health & Saf. Code, § 1345, subd. (j).) Similarly, few people would guess that a roller coaster at an amusement park is a "common carrier," and yet the statutory definition encompasses such rides. (Civ. Code, § 2168; Gomez v. Superior Court (2005) 35 Cal.4th 1125, 1133.) And a "card" colloquially means a small piece of paper or plastic with printing or writing, but "the Legislature did not intend the word 'card' to have its colloquial meaning," and hence an "access card" could include a cell phone. (People v. Butler (1996) 43 Cal.App.4th 1224, 1234-1235.)

Second, the common understanding of "shoplifting," as reflected in the statutes of sister states, often does encompass theft by false pretenses. The trial court supposed that the drafters of the shoplifting statute did not "contemplate" that it covered anything other than "going into a retail establishment like Walmart or Sears or some other establishment and committing a petty larceny." (RT (6) 251.) Yet, it is not peculiar in American jurisprudence to use the term "shoplifting" to encompass false pretenses and other conduct beyond physically lifting and secretly escaping with an item from a shop. In Maryland, for example, "shoplift," which means "depriving a merchant of all or any part of the value or use of merchandise," encompasses not just the colloquial meaning ("Removing any merchandise from its immediate place of display or from any other place on the premises of the mercantile establishment") but also false pretenses similar to Gonzales's action:

(2) Obtaining or attempting to obtain possession of any merchandise by charging that merchandise to another person without the authority of that person or by charging that merchandise to a fictitious person[.]

(Md. Code, Cts. & Jud. Proc., § 3-1301(g) (dealing with civil penalties for the crime defined as "shoplift"); see <u>Ishola v. State</u> (2008) 404 Md. 155, 163 [945 A.2d 1273].)

Similarly, in West Virginia the statutory crime called

"shoplifting" encompasses a type of credit-card fraud: defendant "[r]epudiates a card-not-present credit or debit transaction after having taken delivery of merchandise ordered from the merchant and does not return the merchandise or attempt to make other arrangements with the vendor." (W.Va. Code, § 61-3A-1.)

In Delaware the statutory crime called "shoplifting" encompasses documentary fraud: "Uses any instrument whatsoever, credit slips or chose in action to obtain any goods, wares or merchandise with intent to appropriate the same to the use of the person so taking" (Del.Code, tit. 11, § 840(a)(6).)

In Georgia the statutory crime called "theft by shoplifting" (Ga.Code § 16-8-14) encompassed an elaborate scheme of fraud: defendant brought two tennis rackets into the store and told the clerk he would be returning them; the store clerk scanned the rackets and handed defendant two return stickers; defendant carried the rackets into the aisles while purporting to continue to shop; an accomplice brought him two more expensive rackets that were displayed in the store; defendant abandoned the original rackets and affixed the return stickers to the new rackets; and then he proceeded to the customer-service department to try to "return" them. (Grady v. State (2013) 319 Ga.App. 894, 894-895 [743 S.E.2d 22].)9

⁹ This Court has held that a similar scheme constituted theft by larceny. (People v. Davis (1998) 19 Cal.4th 301, 317-318.) In <u>Davis</u> defendant entered a department store carrying one of the store's shopping bags. (<u>Id.</u> at p. 303.) He took a shirt from a display, put it in the bag, went up to the cashier, and told her he

This widespread use of the statutory term, "shoplifting," to encompass false pretenses casts doubt on the trial court's supposition that the term must always have a narrow meaning. Although the drafters of Proposition 47 did not base section 459.5 on the statute of any other state, they were well within the legislative mainstream in including false pretenses within the new crime. They would have seen nothing incongruous or inapt in calling the new crime "shoplifting."

3. The property taken in the "shoplifting" need not be tangible merchandise. The trial court relied on the fact that "[s]hoplifting is taking something away, merchandise generally." (RT (7) 302; see also (7) 305 ("We don't have a carrying away of merchandise").) Section 459.5, however, does not use the term "merchandise." It specifies "property." (Pen. Code, § 459.5, subd. (a).) "Property" includes "money" (which is what Gonzales received from the bank teller) and other items that have no significant intrinsic value but are valuable solely because of what they represent. (Pen. Code, § 7, ¶ 12 ("The words 'personal property' includes money, goods, chattels, things in action, and evidences of debt"); see also Pen. Code, § 7, ¶ 10 ("The word

had bought it earlier but now wanted to return it. (<u>Ibid.</u>) The cashier issued him a credit voucher. (<u>Ibid.</u>) <u>Davis</u> found this to be theft by larceny because defendant took the shirt and claimed it as his own, all without the consent of the store. (<u>Id.</u> at pp. 317-318.) The court therefore declined to consider whether defendant's conduct might also have constituted "larceny by trick and device or obtaining property by false pretenses." (<u>Id.</u> at p. 318, fn. 14.)

'property' includes both real and personal property").)

When the Legislature wanted to limit the object of a theft to intrinsically valuable physical merchandise, it well understood how to do so, and therefore it can be assumed that the drafters of Proposition 47 understood as well. One provision governing the punishment for petty theft is expressly limited to "petty theft involving merchandise taken from a merchant's premises or a book or other library materials taken from a library facility." (Pen. Code, § 490.5, subd. (a).) The same statute defines "merchandise" "as used in this section" to mean "any personal property, capable of manual delivery, displayed, held or offered for retail sale by a merchant." (Pen. Code, § 490.5, subd. (g)(1); see also id., subd. (g)(2) (defining "merchant").)

In determining to use the word "property" rather than "merchandise" (and, for that matter, "commercial establishment" rather than "merchant"), the drafters of Proposition 47 must have intended not to limit section 459.5 to merchandise, that is, to the traditional object of shoplifting in a colloquial sense. (See In re Austin P. (2004) 118 Cal.App.4th 1124, 1130 ("When different terms are used in parts of the same statutory scheme, they are presumed to have different meanings"); People v. Valentine (1946) 28 Cal.2d 121, 142 ("Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject (in this case, the same subject) is significant to show that a different intention existed"), internal quotation marks and citation omitted.) This is just the converse of the principle of *in pari materia* discussed

above, under which the same word in two different parts of a statutory scheme (here, "larceny") should be defined the same. (See <u>People v. Lamas</u>, <u>supra</u>, 42 Cal.4th at p. 525; see generally 2B Singer et al., Sutherland on Statutory Construction (7th ed., 2015 update) §§ 51:2, 51.3.)

Thus, the trial court's observation that shoplifting generally involves "merchandise" in fact supports Gonzales's interpretation. Section 459.5 deliberately uses "property," even though another part of the same statutory scheme uses "merchandise." "Property" is broader than "merchandise," both in common usage and under the statutory definitions (Pen. Code, § 7; Pen. Code, § 490.5, subd. (g)(1)). Although section 490.5 was not amended by Proposition 47, it is part of the same statutory scheme for purposes of statutory construction, for it deals with punishment for a petty theft crime, which (along with drug possession) was precisely the topic that Proposition 47 addressed; and in fact Proposition 47 amended or added two adjacent provisions. (See Pen. Code, § 490.2; Pen. Code, § 496; Pamphlet, supra, §§ 8-9, p. 72.) (See Sutherland on Statutory Construction, supra, § 51.3 ("Statutes may be in pari materia whether independent or amendatory in form, whether in the form of a complete enactment dealing with a single, limited subject matter or of sections in a code or revision, or any combination of these"); Alejandro N. v. Superior Court, supra, 238 Cal. App. 4th at p. 1225 ("Thus, we presume the Proposition 47 voters were aware" of existing statutes that would govern the new law); People v. Superior Court (Cervantes), supra, 225 Cal.App.4th at p. 1015.)

4. The explicit requirement of Proposition 47 that its terms be liberally construed supports Gonzales's interpretation.

Proposition 47 specifies that "[t]his act shall be liberally construed to effectuate its purposes." (Pamphlet, <u>supra</u>, § 18, p. 74; see also <u>id.</u>, § 15, p. 74 ("This act shall be broadly construed to accomplish its purposes").) Proposition 47 made explicit its remedial purposes. (<u>Id.</u>, § 3, p. 70.) These included:

Requir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.

(<u>Ibid.</u>) That the overriding purpose of the Act is to reduce the punishment for nonserious, nonviolent offenses is also demonstrated by the provision governing legislative amendments. Whereas the Act requires a two-thirds supermajority vote of the Legislature to make amendments that are "consistent with" the Act, it requires only a majority vote to "amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (Pamphlet, <u>supra</u>, § 15, p. 74.) In making it much easier for the Legislature to further reduce penalties, in comparison to other amendments, the voters made clear their overriding purpose in enacting the Proposition.

The Opinion below noted that "Gonzales argued the court should liberally construe the Act" (<u>People v. Gonzales</u>, <u>supra</u>, 242 Cal.App.4th at p. 38), but it did not otherwise address this

principle.

Assuming arguendo that it is a close case whether "larceny" in section 459.5 encompasses theft by false pretenses, the statutory directive that the Act be liberally construed to effectuate its purposes should resolve the issue. Burglary with intent to commit theft by false pretenses in an amount of \$950 or less is at least as "nonserious, nonviolent" as entering a department store intending to steal an expensive watch, which certainly constitutes "shoplifting" pursuant to section 459.5 even under the Opinion below. (See People v. Gonzales, supra, 242) Cal.App.4th at p. 39.) In fact, entry with intent to commit theft by false pretenses carries less of a risk of violence than shoplifting by larceny. A shoplifter who carries away a physical item risks being detected by store security or by a passer-by, who may confront the shoplifter, leading to physical violence and perhaps even death. For example, in <u>People v. Estes</u> (1983) 147 Cal.App.3d 23, 25-26, a store security guard observed defendant shoplift some clothing, and when the guard confronted him, he "pulled out a knife, swung it at [the guard], and threatened to kill [him]." Cashing a forged check at a bank does not involve such an inherent risk, for it is likely to be a day or longer before the theft is discovered, just as in this case. (See CT 31.)10

¹⁰ Appellant does not argue that violence is *never* a risk in a burglary with intent to commit theft by false pretenses, or in any other crime. (See <u>People v. Williams, supra,</u> 57 Cal.4th at p. 787 (defendant "shoved the Walmart security guards during his attempt to flee the store after acquiring the store gift cards through theft by false pretenses").)

Thus, the purpose of the Act would be better effectuated by including Gonzales's crime within section 459.5, rather than by excluding it. Certainly nothing in the Act suggests that this type of nonserious and nonviolent crime should be excluded. To the contrary, the Act expressly encompasses the very means used in this case: forgery. (Pamphlet, supra, § 6, p. 71 (adding Pen. Code, § 473, subd. (b), to treat "forgery relating to a check" valued at \$950 or less to be punished as a misdemeanor unless defendant has qualifying priors).) (Gonzales was originally charged with forgery involving a check (uttering a forged check) (Pen. Code, § 476) as count 2. (CT 2.)) The Act also reduces the punishment for "theft" of \$950 or less, which was the intended crime for Gonzales's burglary. (Pamphlet, supra, § 8, p. 72; see Pen. Code, § 490.2.)

In summary, everything Gonzales *intended* to do was explicitly within the scope of the remedial provisions of Proposition 47. His *actual* charged conduct was no more serious, and presented less of a risk of violence, than shoplifting a physical item from a store. Gonzales's conduct therefore squarely fell under the stated purpose to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Pamphlet, <u>supra</u>, § 3(3), p. 70.) Accordingly, when the Act is liberally construed to effectuate its purposes, as the Act itself mandates, his conduct must be deemed to be within the scope of section 459.5. (Cf. <u>Ezzy v.</u> Workers' Comp. Appeals Board (1983) 146 Cal.App.3d 252, 264

(in a "close case" of workers' compensation coverage, the employee was entitled to benefits because of the statutory requirement that the workers' compensation law be "liberally construed" to extend benefits); Ennabe v. Manosa (2014) 58 Cal.4th 697, 713 (where statute expressly required that alcoholic beverage law be "liberally construed" to promote temperance, "[gliving the law a liberal construction that leans in favor of promoting temperance suggests that, in a close case, we should err on the side of permitting liability").)

5. The rule of leniency supports Gonzales's interpretation.

"If a statute defining a crime or punishment is susceptible of two reasonable interpretations, [the Supreme Court] ordinarily adopt[s] the interpretation that is more favorable to the defendant." (People v. Arias (2008) 45 Cal.4th 169, 177.) This "rule of lenity is a tie-breaking principle, of relevance when two reasonable interpretations of the same provision stand in relative equipoise." (People v. Boyce (2014) 59 Cal.4th 672, 695, internal quotation marks and citation omitted.) The rule applies to remedial penal statutes that lessen the punishment, including Proposition 47. (People v. Bush (March 22, 2016, E062790) Cal.App.4th [2016 WL 1103986, *6] ("Here, where Proposition 47, including section 1170.18, is ambiguous and there are two equally reasonable interpretations, we take into account the rule of lenity"); People v. Blakely (2014) 225 Cal.App.4th 1042, 1048-1049, 1053-1054 (holding that defendant was not categorically ineligible for Proposition 36 relief, after taking into account the

rule of lenity).)

Here, assuming arguendo that Penal Code section 490a does not squarely resolve the issue in Gonzales's favor, the scope of "larceny" in section 459.5 is, at worst, a question in equipoise for the reasons discussed above. Accordingly, under the rule of lenity, the statute should be construed in defendant's favor.

For all of these reasons, the Opinion below erred in construing section 459.5 to exclude Gonzales's conduct. The erroneous denial of the petition violated Gonzales's right due to process under the Fourteenth Amendment for the same reasons. (See <u>Fetterly v. Paskett</u> (9th Cir. 1993) 997 F.2d 1295, 1300 ("the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"); <u>Hicks v.</u> Oklahoma (1980) 447 U.S. 343.)

D. The remedy is to order the granting of the petition or, in the alternative, to remand for further proceedings.

The People have never argued that Gonzales does not meet the other statutory prerequisites. (See CT 56-58 (People's opposition to petition); CT 70-75 (People's supplemental opposition).) He has not been convicted of a disqualifying crime, and the People have not contended otherwise either in the trial court or in the Court of Appeal. (See CT 32 (probation report).) (See Pen. Code, § 1170.18, subd. (i) (specifying the disqualifying felonies).) Similarly, the People never argued that Gonzales

"would pose an unreasonable risk of danger to public safety" – that is, "an unreasonable risk that the petitioner will commit a new violent felony" – if the petition were granted. (Pen. Code, § 1170.18, subd. (b), subd. (c).) (The statute specifies a "violent felony" to be certain sex crimes, homicide, and comparable crimes. (Pen. Code, § 1170.18, subd. (c), incorporating by reference the crimes specified in Pen. Code, § 667, subd. (e)(2)(C)(iv); People v. Hoffman, supra, 241 Cal.App.4th 1304, 1310 ("Proposition 47 withholds its benefits from 'rapists, murderers, molesters and the most dangerous criminals,' but not from other offenders") (quoting Voter Information Guide).)11

In fact, since the People agreed to, and the court approved, a plea bargain that contemplated probation and time served (CT 12; (RT (1) 1), rather than any prison time, and Gonzales had no prior or subsequent history suggesting that he might commit a qualifying violent felony, "the record would not support such a finding." (People v. Hoffman, supra, 241 Cal.App.4th at p. 1310.) Even after his probation violation, the court reinstated probation on condition of 130 days of additional jail time, of which Gonzales

¹¹ Gonzales's prior history consisted of misdemeanor criminal threats (Pen. Code, § 422), felony accessory after the fact following a home-invasion robbery (Pen. Code, § 32), and second-degree burglary (Pen. Code, § 459). (CT 32, 35-36.) His subsequent history was two instances of probation violation involving simple drug possession and paraphernalia possession. (CT 41-43, 46 (probation reinstated with modifications); CT 47-49, 80 (probation reinstated with 130 days of additional jail time).) When he missed the original sentencing hearing, the court imposed an additional 16 days of custody. (RT (2) 52-53.)

had already served 89 days. (CT 80.) Thus, not just the record on appeal but the trial court's own acts demonstrate that the court did not believe he presented an unreasonable risk of committing a violent felony.

It would therefore be an idle act to remand for further fact finding. (Cf. In re Aguilar (2008) 168 Cal.App.4th 1479, 1491 ("Because we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor would amount to an idle act"); People v. Bruce G. (2002) 97 Cal.App.4th 1233, 1248 ("Obviously, a remand for resentencing would be an idle act if it would be an abuse of discretion to grant probation in this case").)

In the alternative, the case should be remanded with directions that the trial court determine whether Gonzales satisfies the remaining prerequisites. (See <u>People v. Vargas</u>, <u>supra</u>, 243 Cal.App.4th at pp. 1428-1429.)

In the alternative, the trial court erred in denying Gonzales's petition because Proposition 47 impliedly includes any second-degree burglary involving property valued at \$950 or less

As noted in section I(C)(4) above, Proposition 47 explicitly requires that it be "liberally construed" and "broadly construed" to effectuate its purposes, including the reduction of punishment for nonserious, nonviolent crimes. (Pamphlet, <u>supra</u>, §§ 3, 15, 18, pp. 70, 74.) Even apart from this explicit directive, "[r]emedial statutes should be broadly and liberally construed to promote the underlying legislative goals." (<u>In re Estate of Stoker</u> (2011) 193 Cal.App.4th 236, 242; see generally 3 Sutherland on Statutory Construction, <u>supra</u>, § 60:1 ("Remedial statutes are liberally construed to suppress the evil and advance the remedy").)

Assuming arguendo that "larceny" in section 459.5 encompasses only the larceny theory of theft, contrary to Penal Code section 490a, Proposition 47 should nonetheless be construed to impliedly authorize relief as to a burglary involving an intended theft from a commercial establishment during business hours where the property is valued at \$950 or less. As explained in subsection I(C)(4), there is no apparent reason why Gonzales's conduct should be excluded from the scope of the remedial provisions of the Act, where the intended conduct on which the burglary was based (forgery of a check and theft) was covered by the Act, and where the entry itself was no more serious or violent than shoplifting a physical item from a store,

and in fact did not carry so high a risk of violence.

The courts routinely construe statutes to imply additional provisions in order to effectuate legislative intent. For example, in People v. Pieters (1991) 52 Cal.3d 894, 898, a statute exempted the punishment of certain specified statutory provisions from the general double-the-base-term cap. The drug enhancement at issue, however, was not one of the stated exemptions. (Ibid.) Yet, even though "[t]he People concede the literal language of [the drug-enhancement statute] is unambiguous," this Court, relying on the legislative intent to increase penalties for certain drug crimes, "held the Legislature impliedly created an exception to [the double-the-base-term restriction] when it enacted [the drug-enhancement statute]." (Id. at pp. 898, 899, 902.)

Here, the unequivocal, explicit intent of the voters was to reduce sentences in a broad category of low-value, nonviolent, nonserious crimes. (Pamphlet, <u>supra</u>, § 3, p. 70.) Just as <u>Pieters</u> found an implied exception in order to further the Legislature's intent to *increase* the punishment for a certain category of crimes, so an implied exception in order to further the voters' intent to *decrease* the punishment of a different category of crimes should be found in this case.

Other cases apply and illustrate the same principle. In People v. Calban (1999) 65 Cal.App.3d 578, 584, a criminal statute dealing with elections, "when read literally," "imposes an absolute criminal liability" and does not require knowledge. Notwithstanding this plain language, the Court of Appeal implied

an additional element in light of legislative intent:

We see no reason in logic or public policy why the Legislature would intend to apply a higher standard of criminal culpability – i.e., absolute liability for filing a false affidavit regardless of knowledge of the falsity – to private persons as contrasted with public officials and employees. Thus, we conclude that the omission of a knowledge requirement from [the statute at issue] simply was due to legislative oversight, and such a requirement must be implied as part of the statute.

(Id. at p. 585.) So, too, in this case, there is "no reason in logic or public policy" why the voters would reduce the sentences for lowvalue forgery, theft, and burglary with intent to commit a lowvalue theft of a physical item, but not for burglary with intent to commit a low-value theft by means of forgery. Gonzales's crime must therefore be implied in the statute, just as in <u>Calban</u>. (See also, e.g., McLaughlin v. State Board of Education (1999) 75 Cal.App.4th 196, 223 ("we conclude that the failure to specifically amend [the statute] to add the core provisions of the Chapter was due to an oversight by the initiative's drafters") (footnote omitted); Turner v. Association of American Medical Colleges (2011) 193 Cal.App.4th 1047, 1069 ("An analysis of the public policy considerations supports finding an implied exception to a prevailing defendant's right to recover fees under [the statute] in the circumstances of this case"); People v. Jackson (1985) 37 Cal.3d 826, 838 ("To carry out the intention of the enactment, we

read [the statute] as if it contained an exception for enhancements for serious felonies pursuant to [Penal Code] section 667, comparable to the explicit exception for enhancements for violent felonies under section 667.5"), overruled on other grounds in People v. Guerrero (1988) 44 Cal.3d 343, 348.)

The Opinion below rejected implied inclusion of Gonzales's crime. (People v. Gonzales, supra, 242 Cal.App.4th at pp. 40-41.) The Opinion invoked the maxim that where a statute specifies some items, others are not to be implied in the absence of a clear legislative intent to the contrary. (Id. at p. 40.) That maxim, however, "is subordinate to the primary rule that legislative intent governs." (1 Witkin and Epstein, California Criminal Law (4th ed. 2012) Introduction – Crimes, § 36, p. 70.) As Sutherland explains: "Courts must apply the maxim *expressio unius* with great caution, and only under certain conditions" and "should be careful not to allow its use to thwart legislative intent." (2A) Sutherland on Statutory Construction, supra, § 47.25; see generally Code Civ. Proc., § 1859 ("In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible").)

Thus, for example, in <u>In re Joseph B.</u> (1983) 34 Cal.3d 952, 954, this Court considered the scope of a minor's right to appeal issues that arose before he pleaded to the petition. The Attorney General, relying on the same maxim that the Opinion below

cited, argued that because a statute authorized a juvenile appeal for one type of pre-plea issue (denial of a suppression motion), the Legislature must have intended to preclude appeals raising other pre-plea issues. (<u>Id.</u> at p. 956.) This Court disagreed, observing:

the phrase has "no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions. More in point here is the principle that such rules shall always be subordinated to the primary rule that the intent shall prevail over the letter.

(<u>Id.</u> at p. 957, internal quotation marks, ellipses, and citations omitted.) Further, "the maxim has no application where no manifest reason exists why other persons or things than those enumerated should not be included and thus exclusion would result in injustice." (<u>Ibid.</u>, internal quotation marks and citation omitted.) The Court found no such manifest reasons for precluding pre-plea appeals by minors, and accordingly held, for this and other reasons, that there were no restrictions on the right to appeal. (<u>Id.</u> at pp. 957-960.)

That is the posture of Gonzales's case. There is "no manifest reason" why Proposition 47 should *require* relief for low-value forgery and theft, and for burglary with the intent to commit a low-value theft of a physical item, and yet not require — in fact, disallow — relief for a burglary with the intent to commit a low-value theft by means of forgery. (As noted earlier, Proposition 47 *requires* relief for a qualifying defendant. (E.g., Alejandro N. v. Superior Court, supra, 238 Cal.App.4th at pp.

1222-1223.))

Similarly, in People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 522, the Attorney General, citing the same maxim, argued that the fact that the three-strikes law authorized two grounds for the prosecutor to move to dismiss a strike, and only one ground for the trial court to do so, the statute must have intended not to authorize the trial court to invoke the second ground. This Court found the argument based on that maxim to be "not persuasive" in light of the entire statutory framework. (Ibid.; see also, e.g., Estate of Banerjee (1978) 21 Cal.3d 527, 539-540 (rejecting one party's invocation of the maxim as to a statute involving taxation of estates); People v. One 1986 Cadillac Deville (1999) 70 Cal.App.4th 157, 161·162 (rejecting People's invocation of the maxim in a civil-forfeiture case: "the maxim is subordinate to the canon that ambiguity should be resolved in favor of the party opposing the application of a statute, such as a forfeiture statute, which is penal in nature").)

The Opinion considered it dispositive that the Act "fail[ed] to include section 459 in this list." (People v. Gonzales, supra, 242 Cal.App.4th at pp. 40-41.) This overlooks the fact that section 459 encompasses not just low-value, nonserious, nonviolent burglaries but also high-value, potentially deadly burglaries, such as breaking into a house in the middle of the night while the occupants were sleeping. (See, e.g., People v. Cardenas (2015) 239 Cal.App.4th 220, 224-225; see Pen. Code, § 667.5, subd. (c)(21) (a first-degree burglary in which an occupant was present

in the residence is a "violent felony" subject to enhanced punishment); Pen. Code, § 1170.12, subd. (b)(1) (incorporating Pen. Code, § 1192.7, subd. (c)(18)) (first-degree burglary is a "serious felony" for purposes of the three-strikes law).) Given the scope of section 459, the drafters of the Act evidently found it impractical to simply add a clause to section 459 authorizing relief for a burglary where the value was \$950 or less, similar to what the drafters did in the case of forgery (Pen. Code, § 473). (See Pamphlet, supra, § 6, p. 71) Instead, the drafters found it better to create a new crime that carved out some burglaries while leaving others untouched, just as the drafters did by creating a new petty-theft statute, but in each case crossreferencing the broader existing statute. (See Pen. Code, § 459.5, subd. (a) ("Notwithstanding Section 459, shoplifting is defined as . . . "); Pen. Code, § 490.2 ("Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft . . . ").)

Thus, the "failure to include section 459 in this list" (Gonzales at pp. 40-41) means only that it was the type of broad, unwieldy statute that, like the grand theft statute (Pen. Code, § 487), was best dealt with by adding a new, carved-out and cross-referenced, statute, rather than by amending the original statute. Its omission has no other significance. Having resolved the drafting difficulty by creating the new shoplifting statute, the drafters must have failed to notice that nonlarceny thefts from "commercial establishments" might not be encompassed. They could not have intentionally omitted such crimes for the reasons

discussed above. 12

For these reasons, if "larceny" in section 459.5 is determined not to encompass theft by false pretenses pursuant to section 490a and case law, it must be deemed to include that crime by implication. The intent of the voters was clear. There is no reason of policy from which it might be inferred that the omission was deliberate. This case should therefore be remanded for the remedy discussed in section I(D).

¹² This Court is currently considering a related issue of implied inclusion: whether Proposition 47 applies to a nonspecified crime that is a lesser included offense to a specified crime. (People v. Page (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793 ("Does Proposition 47 ('the Safe Neighborhoods and Schools Act') apply to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851), because it is a lesser included offense of Penal Code section 487, subdivision (d), and that offense is eligible for resentencing to a misdemeanor under Penal Code sections 490.2 and 1170.18?").)

CONCLUSION

For the foregoing reasons, defendant and appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: March 28, 2016. Respectfully submitted,

Richard A. Levy Attorney for Giovanni Gonzales

ATTACHMENT

(Pen. Code, §§ 459, 459.5, 484, 490a)

West's Annotated California Codes

Penal Code (Refs & Annos)

Part 1. Of Crimes and Punishments (Refs & Annos)

Title 13. Of Crimes Against Property (Refs & Annos)

Chapter 2. Burglary (Refs & Annos)

West's Ann.Cal.Penal Code § 459

§ 459. Definition

Currentness

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Credits

(Enacted in 1872. Amended by Code Am.1875-76, c. 56, p. 111, § 1; Stats.1913, c. 144, p. 228, § 1; Stats.1947, c. 1052, p. 2452, § 1; Stats.1977, c. 690, p. 2220, § 3; Stats.1978, c. 579, p. 1985, § 22; Stats.1984, c. 854, § 2; Stats.1987, c. 344, § 1; Stats.1989, c. 357, § 2; Stats.1991, c. 942 (A.B.628), § 14.)

Notes of Decisions (925)

West's Ann. Cal. Penal Code § 459, CA PENAL § 459

Current with urgency legislation through Ch. 2 of 2016 Reg. Sess. and Ch. 1 of 2015-2016 2nd Ex. Sess.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

West's Annotated California Codes

Penal Code (Refs & Annos)

Part 1. Of Crimes and Punishments (Refs & Annos)

Title 13. Of Crimes Against Property (Refs & Annos)

Chapter 2. Burglary (Refs & Annos)

West's Ann.Cal.Penal Code § 459.5

§ 459.5. Shoplifting

Effective: November 5, 2014 <u>Currentness</u>

- (a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.
- (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

Credits

(Added by Initiative Measure (Prop. 47, § 5, approved Nov. 4, 2014, eff. Nov. 5, 2014).)

Notes of Decisions (8)

West's Ann. Cal. Penal Code § 459.5, CA PENAL § 459.5

Current with urgency legislation through Ch. 2 of 2016 Reg.Sess. and Ch. 1 of 2015-2016 2nd Ex.Sess.

End of Document

 \oplus 2016 Thomson Reuters. No claim to original U.S. Government Works.

West's Annotated California Codes

Penal Code (Refs & Annos)

Part 1. Of Crimes and Punishments (Refs & Annos)

Title 13. Of Crimes Against Property (Refs & Annos)

Chapter 5. Larceny [Theft] (Refs & Annos)

West's Ann.Cal.Penal Code § 484

§ 484. "Theft" defined

Effective: January 1, 2001 Currentness

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.
- (b)(1) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and that property has a value greater than one thousand dollars (\$1,000) and is not a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 10 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.
- (2) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and where the property has a value no greater than one thousand dollars (\$1,000), or where the property is a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.
- (c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.
- (d) The presumptions created by subdivisions (b) and (c) are presumptions affecting the burden of producing evidence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

Credits

(Enacted in 1872. Amended by Stats.1927, c. 619, p. 1046, § 1; Stats.1935, c. 802, p. 2194, § 1; Stats.1965, c. 1602, p. 3694, § 1; Stats.1967, c. 1335, p. 3167, § 1; Stats.1980, c. 1090, p. 3500, § 1; Stats.2000, c. 176 (S.B.1867), § 1.)

Notes of Decisions (860)

West's Ann. Cal. Penal Code § 484, CA PENAL § 484 Current with urgency legislation through Ch. 2 of 2016 Reg.Sess. and Ch. 1 of 2015-2016 2nd Ex.Sess.

End of Document

 $\ensuremath{\mathfrak{C}}$ 3016 Thomson Reuters. No claim to original U.S. Government Works.

West's Annotated California Codes

Penal Code (Refs & Annos)

Part 1. Of Crimes and Punishments (Refs & Annos)

Title 13. Of Crimes Against Property (Refs & Annos)

Chapter 5. Larceny [Theft] (Refs & Annos)

West's Ann.Cal.Penal Code § 490a

§ 490a. "Theft" substituted for larceny, embezzlement or stealing

Currentness

Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word "theft" were substituted therefor.

Credits

(Added by Stats.1927, c. 619, p. 1047, § 7.)

Notes of Decisions (24)

West's Ann. Cal. Penal Code § 490a, CA PENAL § 490a

Current with urgency legislation through Ch. 2 of 2016 Reg. Sess. and Ch. 1 of 2015-2016 2nd Ex. Sess.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer produced document, calculated pursuant to rule 8.520(c)(1) of the Rules of Court, does not exceed 14,000 words, and that the actual count is: 12,551 words.

Richard A. Levy

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 3868 W. Carson St., Suite 205, Torrance, CA 90503-6706. On the date of execution set forth below, I served the foregoing document described as:

APPELLANT'S OPENING BRIEF ON THE MERITS

as follows:

E-SERVICE: I electronically submitted a true copy of the document to:

Attorney General at ADIEService@doj.ca.gov Appellate Defenders, Inc., at eservice-criminal@adi-sandiego.com

MAIL: I placed a true copy thereof enclosed in a sealed envelope to appellant addressed pursuant to rule 8.360(d) of the Rules of Court.

Executed on March 28 2016, at Torrance, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.